SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 300

JACOB DVORKIN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

FRED B. RHODES,
Counsel for Petitioner.

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Opinion Below.

The opinion of the Court of Claims forms a part of this record which has been prepared by the Court of Claims (R. 11-12).

Jurisdiction.

The final judgment by the Court of Claims was entered July 10, 1944 (R. 12). The jurisdiction of this Court is invoked under the rules adopted by the Supreme Court June 8, 1925.

Question Presented.

Whether the act of Congress of February 28, 1925 (43 Stat. 1061) providing a salary of sixty-five cents per hour for driver-mechanics in the Post Office Department can be evaded by any agreement entered into by an official of the Civil Service Commission and a representative of the Post Office Department, as set forth in the record.

Statement.

This case was decided in the Lower Court on a Demurrer and therefore all facts alleged in the Petition (R. 1-4), and the Amended Bill of Particulars (R. 4-11, must be admitted as true. The facts alleged in such Petition and Amended Bill of Particulars could not be denied as they are all a matter of official record.

In the year 1925, by reason of the depression which existed throughout the Country, an official of the Post Office Department having charge of this particular branch of the service conceived the idea that a large amount of money could be saved to the Government if the law was ignored which required the payment of sixty-five cents per hour to driver-mechanics, as it was believed that there would be no difficulty whatever in getting men to work as driver-mechanics for the salary of fifty-five cents per hour provided by Congress for the payment of garageman-drivers, a lower grade of work.

In an attempt to evade an act of Congress, passed more than ten years ago (R.5), which provided that men doing the work of a driver-mechanic should receive the sum of 65¢ per hour, the Civil Service Commission deliberately discontinued examining any persons to test their fitness for the work of a driver-mechanic. Under the fraudulent scheme connived by these two officials, it was arranged when there were vacancies in the work classed as driver-

mechanic that they would call upon the Commission for persons from the "garageman-driver" list, although they both knew that there was no vacancies for such work existing. Immediately upon arrival at the Post Office, before being permitted to do any work, the applicant was required to take a test as a driver-mechanic. If he failed in such test, he was rejected and sent away, with the information that there were no vacancies for which he was qualified. During the said ten years all vacancies were filled in this manner and there were no appointments made where the applicants were not able to qualify as a driver-mechanic. During the said ten years, and contrary to the postal regulations, no garageman-driver was given the pay of a driver-mechanic, notwithstanding the fact that more than 90% of the work done in this branch of the Post Office consisted of duties pertaining to the work of driver-mechanic.

The claimant bases his assertion as to the right to receive the wages prescribed for the duties of a driver-mechanic upon the following five series of actions (R. 6):

First, The Act of Congress of 1925 which prescribed that all employees performing the duties of a driver-mechanic should be paid 65 cents per hour.

Second, the published notices of the Post Office Department that a person entering this branch of service would receive the wages of a driver-mechanic when promoted to the grade requiring the performance of this class of work.

Third, the regulation of the Post Office Department of May 12, 1930, set forth in letter of August 11, 1941, to Charles I. Frankel (R. 6), which provided that driver-mechanics would be promoted immediately upon passing the prescribed noncompetitive examination. Claimant passed such examination before entering upon any duties whatsoever, but was not paid for the duties for which he

was qualified and to which he had been assigned by the Post Office Department.

Fourth, that the abolishment of the register by the Civil Service Commission was illegal and done to evade the requirement prescribed by Congress for the wages of driver-mechanics (R. 6).

Fifth, that at the time the claimant was put to work, the rules and regulations of the Post Office Department, which have the effect of law, provided that the Post Office Department should keep a record of the number of hours the employees worked in a dual capacity and that their titles should correspond to the positions to which the employees devoted a greater portion of their time. (Regulation 297 of the Rules and Regulations of the Post Office Department, 1925):

> "Employees' assignments shall, wherever possible, correspond with their roster title. Where the interest of the service requires that an employee perform several duties, his title designation shall correspond to the position to which he is required to devote the greater portion of his time."

The Court denied this claim in its opinion (R. 11-12), on the theory laid down in the case of *George L. Coleman* v. *United States*, 100 C. Cls. 41, which held that an employee was only entitled to receive the salary of the position to which he had been appointed. The Court then goes on to say that in the present case the "petition does not allege he was appointed a driver-mechanic, but he says his bill of particulars does." It is respectfully submitted that the *Coleman* case has no bearing whatever on the present case. In that case, Petitioner alleged specifically that he had been appointed garageman-driver but was endeavoring to secure the salary of a driver-mechanic, because he had been assigned to such work. In the Bill of Particulars

(R. 4-11) it is specifically alleged that Petitioner was appointed a driver-mechanic and alleges the steps taken by the Government to accomplish that assignment. It is respectfully submitted that the allegations contained in the Bill of Particulars are just as effective as those stated in the Petition itself.

In the case of *Glavey* v. *The United States*, 182 U. S. 595, which was a very similar case, appealed from the Court of Claims, this Court states the law to be as follows:

> "During the time the claimant was performing the duties of special inspector of foreign steam vessels, as aforesaid, he made no request or demand upon the Secretary of the Treasury or any other officer of the defendants, to be paid the salary prescribed by law for the incumbent of the office of special inspector of foreign steam vessels at said port, nor did he when he subscribed the oath as aforesaid; nor did he at any time thereafter while he held said office of local inspector of hulls of steam vessels, for which he was paid as aforesaid, make to the Secretary of the Treasury or to any other officer of the government any protest or objection whatever to the performance of the duties of special inspector of foreign steam vessels in connection with his appointment as local inspector of hulls of steam vessels at said port without additional compensation.
>
> "It remains to inquire whether, by reason of the statement in the Secretary's letter or communication of May 15th, 1891, that the appointment in question was 'without additional compensation' beyond that received by the appointee as local inspector of hulls of steam vessels, Glavey was estopped to demand the salary fixed by the Act of 1882 for special inspectors of foreign steam vessels.
>
> "There is no principle upon which an individual appointed or elected to an official position can be compelled to take less than the salary fixed by law. The acceptance and discharge of the duties of the office after

appointment is not a waiver of the statutory provision fixing the salary therefor, and does not establish a binding contract to perform the duties of the office for the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent.

"The ruling in that case was reaffirmed in Kehn v. State, 93 N. Y. 291, 294, which involved the claim of a fireman whose compensation had been reduced by his superior office below that fixed by law. The court, speaking by Judge Rapallo, reaffirmed the principles of the Satterlee Case, and approved the decision in Goldsborough v. United States, Taney Dec. 80, 88, Fed. Cas. No. 5,519, saying: 'The present case, however, is stronger than either of those cited. At the time the appellant entered into the service his pay was fixed by law, and there is no evidence that he ever consented to a change. It was reduced by the superintendent, and for a portion of the time the appellant took the reduced pay, but that does not estop him from claiming his full pay if he was legally entitled to it.'

"In the Goldsborough Case referred to, Chief Justice Taney said: 'Where an Act of Congress declares that an officer of the Government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress.'

"In Adams v. The United States, 20 Ct. Cls. 115, which involved the compensation due to one who had performed the duties of an inspector and also of deputy collector of customs, the court said: 'The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector

and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it.' In the same case it was also said: 'Monthly vouchers were drawn up, reciting the number of days the claimant was employed during the month and the amount of compensation allowed by the collector and Secretary, ending with a receipt *in full for compensation for the period above stated*, which the claimant signed. We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant lost nothing by signing it. Fisher's Case, 15 Ct. Cl. 323; United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65.'

"Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed, but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by *spelling out a waiver or estoppel*. If it were held otherwise, the result would be that the heads of executive departments could provide in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective po-

sitions for such compensation as the head of a department, under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the executive department of the Government. Public policy forbids the recognition of any such power as belonging to the head of an executive department. The distribution of officers upon such a basis suggests evils in the administration of public affairs which it cannot be supposed Congress intended to produce by its legislation. Congress may control the whole subject of salaries for public officers; and the mere failure of the appointee to demand his salary as such officer until after he had ceased to be local inspector, was not in law a waiver of his right to the compensation fixed by the statute.

"The judgment of the Court of Claims is reversed and the cause is remanded for further proceedings consistent with this opinion."

The record in this case shows that a large number of deserving employees have been deprived for a period of over ten years of the money to which they were entitled, and for the payment of which specific provision has been made by Congress.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RHODES & RHODES,
By FRED B. RHODES,
Attorneys for Petitioner.

RHODES & RHODES,
314 National Press Building,
Washington, D. C.

No. 300

In the Supreme Court of the United States

OCTOBER TERM, 1944

JACOB DVORKIN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 11–12) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1944 (R. 12). A motion for a new trial was overruled on May 1, 1944, and motion for leave to file a second motion for a new trial was overruled on July 10, 1944 (R. 12–13). The petition for a writ of certiorari was filed on July 28, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the

Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the court below correctly construed the original petition and amended bill of particulars as failing to aver appointment of petitioner to the position of driver-mechanic in the Postal Service.

2. Whether petitioner, a postal employee assigned to duty as a garageman-driver, but performing the duties of a driver-mechanic without being appointed to that position, is entitled to the statutory compensation prescribed by law for a driver-mechanic.

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in Appendix A, pp. 10–11, *infra*.

STATEMENT

Petitioner, a postal employee, filed a petition in the Court of Claims, seeking to recover $1,200, alleged to be the difference between the pay of a substitute garageman-driver (55¢ per hour) which he received from April 1, 1938, to October 27, 1941, and the higher pay of a substitute driver-mechanic (65¢ per hour) for the same period (R. 1–4). The petition nowhere alleged that petitioner was appointed a driver-mechanic but merely alleged that "on April 1, 1938, he was appointed to that branch of the Post Office Department"

requiring the services of garagemen-drivers, driver-mechanics, and certain other types of employees, named in Section 6 of the Reclassification Act of 1925 (R. 1). The petition further alleged that it was "expressly understood and agreed" that while petitioner was employed "under said appointment" a record would be kept of the number of hours he worked as a garageman-driver and as a driver-mechanic, respectively, and that he would be paid 55¢ per hour when employed as a garageman-driver and 65¢ per hour when employed as a driver-mechanic, in accordance with the rates fixed by Section 6 of the Reclassification Act of 1925; that no such record was kept; and that "during practically all his employment" he performed the services of a driver-mechanic but was paid only the compensation fixed for a garageman-driver (R. 1–2).

The United States filed a motion, granted by the court below (R. 4), for a bill of particulars to explain, among other things, the particulars concerning the alleged express understanding and agreement for dual employment, and the nature of petitioner's alleged "appointment" to office. Appended to the motion, as Exhibit A, was a copy of a record of the New York Post Office, signed by petitioner and the Postmaster, showing petitioner's assignment to duty on April 1, 1938, as a Temporary Substitute Garageman-Driver.[1]

[1] The record before this Court fails to include this motion. Inasmuch as it is referred to in the amended bill of particulars (R. 4, 7) and because it is helpful in appraising the

On October 30, 1943, petitioner filed his bill of particulars which, as amended on January 22, 1944 (R. 4–7), did not amplify the averments with respect to the alleged express understanding and agreement, but included allegations that "The claimant was duly appointed as a driver-mechanic"; that "Upon his assignment to the Post Office Department for duty" he was required to take a non-competitive examination as a driver-mechanic; that he passed the examination and was assigned to the duties of a driver-mechanic; and that "The act of requiring claimant to take a non-competitive examination as driver-mechanic before being allowed to work and his assignment to the duties of the classification for which he had successfully passed an examination constituted his appointment as driver-mechanic." The bill of particulars nowhere denied the authenticity of Exhibit A but alleged that it was "one of the steps in carrying out the fraud which was perpetrated" upon petitioner "by the representatives of the Civil Service Commission and the Post Office Department," who, knowing there were no "vacancies" for garagemen-drivers, assigned to the duties of driver-mechanics, at the pay of garagemen-drivers, persons from the Civil Service list of eligibles for garagemen-drivers who were able to pass a test as driver-mechanics (R. 4–5).

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allegations thereof, the motion is set forth in Appendix B, pp. 12–14, *infra*.

On December 27, 1943, the United States demurred to the petition (R. 11). The court below sustained the demurrer and dismissed the petition (R. 12) on the ground that the "test *of* a person's right to salary" is "not the duties performed, but the position or grade to which appointed" and that petitioner had avoided "alleging the character of his 'assignment' to the Post Office Department," which "is the determinative question" (R. 12).

ARGUMENT

The court below properly ruled that petitioner's allegations failed to establish a right to the salary of a driver-mechanic during the claim period.

1. The Court of Claims has heretofore held that a person appointed to the position of garageman-driver, but performing the duties of a driver-mechanic, is not entitled to the compensation of a driver-mechanic. *Coleman* v. *United States*, 100 C. Cls. 41. This holding merely reaffirmed the well-established rule that the right to the salary of an office or position does not accrue simply from the performance of the duties of that office but is dependent upon appointment to that office by the person authorized to make the appointment. See *Belcher* v. *United States*, 34 C. Cls. 400, 421; *Morey* v. *United States*, 35 C. Cls. 603; *Barrett* v. *United States*, 37 C. Cls. 44, 48; *Jackson* v. *United States*, 42 C. Cls. 39.

The holding of the court below that petitioner did not allege his appointment to the office of

driver-mechanic is plainly correct. No such allegation appears either in the complaint, or in the bill of particulars (R. 4–7) filed by petitioner in response to the specific inquiry directed by the Government to the nature of petitioner's appointment. While it is true that the amended bill of particulars states that "The claimant was duly appointed as a driver-mechanic," the remainder of the bill shows that this statement is a legal conclusion, for the bill then explains that upon "assignment to the Post Office Department for duty" petitioner was required to take an examination as a driver-mechanic (which he passed) and that "The act of requiring claimant to take a noncompetitive examination as driver-mechanic before being allowed to work and his assignment to the duties of the classification for which he had successfully passed an examination constituted his appointment as a driver-mechanic" (R. 4–5).[2] If petitioner in fact had been appointed driver-mechanic, it would have been a simple matter so to aver directly in either his original petition (R. 1–4) or one of his two bills of particulars (R. 4–7).[3]

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[2] Moreover, at a later point in the bill of particulars, petitioner states that "Under the theory of law *he was entitled to assume* that the Post Office official in charge had complied with the law and *that he had been appointed* and was employed and was entitled to receive the pay of driver-mechanic" (R. 7). [Italics supplied.]

[3] In order to dissipate any notion that petitioner was a victim of technicalities of pleading, and that an appoint-

2. Petitioner relies upon regulations or announcements of the Post Office Department allegedly entitling him to promotion or appointment to the position of driver-mechanic (Pet. 3–4). But it is settled that it is the actual appointment or promotion that controls and not the right thereto. *United States* v. *McLean*, 95 U. S. 750; *Morey* v. *United States*, 35 C. Cls. 603. *Glavey* v. *United States*, 182 U. S. 595, from which petitioner quotes at great length (Pet. 5–8), affords him no support, for it involves a suit for the salary of an office by a person actually appointed to that office. Similarly, petitioner's reliance upon Section 6 of the Reclassification Act, Appendix A, p. 10, *infra*, is unwarranted, for that Act merely prescribes the

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ment to the position of driver-mechanic could have been factually alleged, there are set forth in Appendix C, pp. 15–18, *infra*, records of the Post Office Department relating to petitioner's appointments for the claim period, and a transcript of petitioner's service record in the Civil Service Commission. These show petitioner's name accompanied by the designation "Temporary Substitute Garageman-Driver," and later "Substitute Garageman-Driver," but never "Driver-Mechanic." Moreover, petitioner has nowhere alleged the receipt or existence of any document designating him as a "driver-mechanic" during the claim period. The Court of Claims has consistently held that an employee's designation upon the records of the department in which he is employed, rather than the services he performs, is determinative of the office to which he has been appointed. *Jackson* v. *United States*, 42 C. Cls. 39; *Barrett* v. *United States*, 37 C. Cls. 44; *Belcher* v. *United States*, 34 C. Cls. 400, 421.

salaries that are to attach to the positions named therein and nowhere purports to change the established rule that one must be appointed to an office before being entitled to the salary attached to such office.

Petitioner's claim is, in substance, an attempt to have applied retroactively a regulation and appointment given him thereunder on November 16, 1941, to serve in a dual capacity. This appointment was made (see Appendix C, p. 15, *infra*) by authority of an order of the Fourth Assistant Postmaster General, issued October 27, 1941, and effective November 16, 1941, establishing a dual employment system. Postmasters were empowered to certify to the Bureau of the Fourth Assistant Postmaster General the names of garagemen-drivers who had passed a practical driving test and to recommend their appointment as temporary substitute driver-mechanics (Government Owned Motor Vehicle Service Rules and Regulations, Post Office Department, 1943, pp. 93–94). Upon approval of such recommendation, an appointee became a "garageman-driver (driver-mechanic)" and was entitled to the salary of a driver-mechanic while actually assigned to driving duties. But since the regulation was not promulgated and petitioner's new appointment was not made until after the claim period, he can draw no support from their provisions.[4]

[4] While the order of the Fourth Assistant Postmaster General was expressly based upon written authority from the

CONCLUSION

The decision below is correct, and there exists no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCES M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

JOSEPH B. GOLDMAN,
Attorney.

AUGUST 1944.

Civil Service Commission, the underlying statutory authority apparently included the Act of March 1, 1929, Section 1, ch. 442, 45 Stat. 1441, 39 U. S. C. 136 (see Appendix A, pp. 10–11, *infra*), permitting the employment of postal employees in a dual capacity "when in the judgment of the Postmaster General" such employment is required by "the needs and interests of the Postal Service" and provided that "the total compensation actually paid for all services does not exceed $2,000 for any one fiscal year." This statute is of no avail to petitioner for the claim period, since (1) his original petition and amended bill of particulars fail to allege that he was actually appointed to serve in a dual capacity, and that his total compensation, if recovery were allowed, would not exceed $2,000 for any one year; and (2) the Postmaster General (through the Fourth Assistant Postmaster General, who by Section 14 (5) of the Postal Laws and Regulations, 1932, was charged with the appointment of personnel in the Motor Vehicle Service) did not, prior to October 27, 1941, make either a general or specific determination that employment of petitioner in a dual capacity was in his "judgment" required by "the needs and interests of the Postal Service."

APPENDIX A

STATUTES

1. Section 6 of the Reclassification Act of 1925 (43 Stat. 1053, 1060, 39 U. S. C. 116) provides, in part, as follows:

> SEC. 6. That employees in the motor-vehicle service shall be classified as follows: * * *
>
> * * * * *
>
> That driver-mechanics employed in the motor-vehicle service shall be divided into five grades: [setting forth per annum salary for each grade]; and garagemen-drivers employed in the motor-vehicle service shall be divided into two grades: [setting forth per annum salary for each grade] * * *.
>
> That the pay of substitute, temporary, or auxiliary employees in the motor-vehicle service shall be as follows: Special mechanics at the rate of 75 cents per hour; general mechanics at the rate of 70 cents per hour; clerks and driver-mechanics at the rate of 65 cents per hour; and garagemen-drivers at the rate of 55 cents per hour.
>
> * * * * *

2. Section 1 of the Act of March 1, 1929 (45 Stat. 1441, 39 U. S. C. 136), reads as follows:

> * * * postmasters and acting postmasters are authorized, when in the judgment of the Postmater General the needs and interests of the Postal Service require, to employ mail messengers and other postal

employees in a dual capacity, or to assign extra duties to such mail messengers and other employees; and, notwithstanding the provisions of sections 1763, 1764, and 1765 of the Revised Statutes, as amended (United States Code, title 5, sections 58, 69, and 70), compensation shall be paid to such mail messengers and other employees for such services if the total compensation actually paid for all services does not exceed $2,000 for any one fiscal year.

APPENDIX B

In the Court of Claims of the United States

No. 45912

JACOB DVORKIN

v.

THE UNITED STATES

DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Now comes the defendant, by its Assistant Attorney General, and moves the Court to require the plaintiff to file, within 20 days, or such other time as may be fixed by the Court, a duly verified bill of particulars making more definite and certain the allegations of paragraph 3 of the petition, by setting forth the following:

> 1. A statement as to whether or not the appointment of April 1, 1938, alleged in said paragraph, was the same appointment that was effectuated by, or made in connection with, the instruction of the Postmaster of the New York Post Office, dated April 1, 1938, a photostatic copy of which is appended hereto and marked "Exhibit A," and whether or not the plaintiff is the same Jacob Dvorkin named therein and whose signature appears thereon: and, if the statement in response to the foregoing is not in the affirmative, or if the plaintiff relies on some other or additional appointment, then the original or a copy of the document effectuating such alleged appointment or, if

this canot be done, then an additional statement explaining why it cannot be done, and identifying the officer who made the alleged appointment and giving the title of the position to which such officer purported to appoint the plaintiff.

2. A statement as to whether or not the plaintiff relies exclusively upon the statutory provision quoted in paragraph 2 of the petition as constituting the express understanding and agreement alleged in paragraph 3 thereof, and if not, the original or a copy of any written contract which may be relied upon, or, if there is no such written contract, a statement identifying the officer who entered into the alleged understanding or agreement on behalf of the defendant, and the time and place thereof, and any other circumstances or events relied upon by the plaintiff as having given rise to such alleged contractual obligations.

MEMORANDUM

* * * * *

Respectfully submitted.

FRANCIS M. SHEA,
Assistant Attorney General.

ENOCH E. ELLISON,
Attorney.

EXHIBIT A

1073

N. Y. 75–A J. J. M.

POST OFFICE, NEW YORK, N. Y.,
OFFICE OF THE POSTMASTER.

Employee must not be employed before the date indicated below.

P. O. GARAGE APRIL 1, 1938

SUPERINTENDENT,
34th St. 11th Ave.

The bearer, Jacob Dvorkin_____
has been instructed to report to you for duty as TEMP. SUB. GARAGEMAN DRIVER

Employee must sign his name on line below in presence of superintendent before proceeding to another station.

(signed) JACOB DVORKIN
(Signature of employee)

vice _____

Residence 2314 Crotona Ave. Badge or Cap No. _____. Salary, $55¢ hr. Bond, $1000.

Please fill in the report below and return this blank to Room 215 immediately, countersigned by bearer.

POSTMASTER.

The above-named employee reported on Apr 1 1938 and has been assigned to duty as a T S Garageman Driver commencing with Apr 1 1938
(Designation)

(signed) JOHN H. DALEY, *Superintendent*
M. C.

Countersigned, JACOB DVORKIN.

5–6988

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION

SERVICE RECORD DIVISION

Dvorkin (Surname) Jacob (Given name)

11-7-10 (Date of birth) New York (Legal residence) No (Charged)

Military preference? None

(Examination from which appointed)

Temporary Appointment - Section 1 Civil Service Rule VII

(If not appointed from examination state authority)

SERVICE HISTORY

4-1-38	Temporary Appointment	Substitute Garageman-Driver, $.55 per hour, Post Office, Motor Vehicle, New York City
4-30-41	Terminated	
5-1-41	Probational Appointment	Substitute Garageman-Driver, $.55 per hour, Post Office, Motor Vehicle, New York, N. Y.

(Substitute Garageman Driver Examination 70.50%, 1937, Second U.S. Civil Service Region)

10-2-41	Probation completed	
11-16-41	Change in Status to Dual Designation	Substitute Garageman-Driver $.55 per hour, Substitute Driver-Mechanic, $.65 per hour

(Passed test 11-10-41 for position of Substitute Driver-Mechanic and may be used in either position)

5-16-44	Transfer	Substitute Carrier, foot of roll, $.65 per hour, Post Off. Service, New York, N.Y.

(Eligible on Junior Investigator Examination, 72.5756, Competitive, 1939)

Form 1472 Dept. 1939 (Initials of transcriber) lrs 8-19-44

U. S. GOVERNMENT PRINTING OFFICE: 1944

APPOINTMENT OF SUBSTITUTE MOTOR VEHICLE EMPLOYEES

United States Post Office

APR 2 1938

New York, New York, April 1, 1938
(Office and State) (Date)

Fourth Assistant,
(Division of Motor Vehicle Service).

I recommend the appointment as substitute temporary Garageman Driver
(Insert designation)
of the persons named below, at 55¢ per hour,
Under Civil Service Rule 7, Section 1,
For an indefinite period.
Names appear on Certificate C-357.
I certify that the selections are regular, under Section 1 Rule 7.

April 1, 1938 (Date) Secretary Civil Service District. Postmaster.

NAME	DATE OF BIRTH	CIVIL SERVICE RATING	TO DATE FROM	REMARKS
Ginex, Joe	11-15-08	88.50	Apr.1,1938	
Springer, Harry	5-27-94	83.33vp	"	
Dvorkin, Jacob	11-7-10	70.50	"	

Approved, APR 7 1938

Fourth Assistant.

Form 4681

Status changed from T.S. Garage Man-Driver. 70.50%

N. Y. 75-A

Post Office, New York, N. Y.

OFFICE OF THE POSTMASTER

Employee must not be employed before the date indicated below

MAY 1 1941, 194

Superintendent, Motor Vehicle Service

The bearer, Jacob Dvorkin

has been instructed to report to you for duty as SUB. GARAGEMAN-DRIVER

Employee must sign his name on line below in presence of superintendent before proceeding to another station.

Jacob Dvorkin
(Signature of employee)

vice

1903 DAVIDSON AVE. N.Y. N.Y.

Residence ~~812 E. 169 ST. BX. N.Y.~~ Badge or Cap No.

Salary, $ .55 hr. Bond, $ 1000.

Please fill in the report below, and return this blank to Personnel Section, G. P. O., Room 3213, immediately, countersigned by bearer.

POSTMASTER

The above-named employee reported on MAY 1 - 1941, 194

and has been assigned to duty as a SUB GARAGEMAN DRIVER (Designation)

commencing with MAY 1 - 1941 194

L. H. Daley, Superintendent.

Countersigned Jacob Dvorkin

16—18902 GPO

Form 1431

APPOINTMENT OF SUBSTITUTE MOTOR VEHICLE EMPLOYEES

THIS FORM MUST BE FORWARDED IN TRIPLICATE

United States Post Office

-8-

New York, New York. (Office and State) May 1, 1941. (Date)

Fourth Assistant,
(Division of Motor Vehicle Service).

I recommend the appointment as substitute Garageman-Driver, (Insert designation)
of the persons named below, at 55¢ per hour.

Names appear on certificate P-5189.

Postmaster.

I certify that the selections are regular.

MAY - 8 1941 (Date)

James [illegible] Manager SECOND Civil Service District.

	NAME	DATE OF BIRTH	CIVIL SERVICE RATING	TO DATE FROM	REMARKS
*	Peterson, Lewis M.	7-27-12	71.50	May 1, 1941	
*	Bowler, Robert F.	5-28-06	71.00	"	
*	Dvorkin, Jacob	11-7-10	70.50	"	
*	Greene, Lloyde E.	9-16-06	70.50	"	
*	Corbellini, Hugo	12-23-10	70.25	"	
*	Marshall, William	4-8-04	70.25	"	

MAY 16 1941

Total 67

* Status changed from Temp. Sub. Garageman-Driver.

Approved:

MAY 13

Fourth Assistant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 300

JACOB DVORKIN, PETITIONER

v.

THE UNITED STATES, DEFENDANT.

PETITIONER'S REPLY BRIEF

This is a claim of an employee of the Post Office Department. It is admitted by the Government that he was employed as a driver-mechanic, the salary of which is fixed by Congress at 65c per hour, but that he was only paid at the rate of 55c per hour, which is the compensation of a garageman-driver. The law under which Petitioner was employed provided that said Petitioner might be employed in a dual capacity, and that he should be paid according to the character of work performed.

It is alleged on Page 4, Paragraph 8, of the Petition as follows: (R-3)

> "8. Notwithstanding the terms of the Reclassification Act, above quoted, which provides that driver-mechanics should receive the sum of 65 cents an hour, the Plaintiff has only received the sum of 55 cents per hour, as aforesaid. That the difference between the sum which he should have received during the past five years, namely 65

> cents per hour, and the amount actually paid to him, amounts to the sum of one thousand two hundred dollars ($1,200.00)."

It is further alleged in the Petition, and not denied, that the reason for the failure of Petitioner and a large number of other employees to receive the money due them for a number of years was by reason of a fraudulent conspiracy between an official of the Post Office Department and an official of the Civil Service Commission, who attempted to take advantage of the low salaries then prevailing to secure men at a lower salary than that fixed by Congress.

The lower Court based its decision on the authority of the Coleman case (George L. Coleman v. United States, 100 C. Cls. 41). The Court was misled in this matter. The Coleman case has no application whatsoever. In the Coleman case, the Petitioner alleged that he had been *appointed* as a garageman-driver and therefore under the decisions of the Court of Claims he could not recover any compensation except that of the position to which he had actually been appointed. In the present case, it is specifically alleged that Petitioner was not appointed as a garageman-driver, but was appointed as a driver-mechanic, the salary to which he was denied.

None of the Exhibits filed in the Appendix of Brief for Respondent, excepting that shown on page 14 were ever filed in the Lower Court. Such Exhibits, however, have no effect upon the case. Two of these papers (Pages 17 and 18 of Brief for Respondent in Opposition) are dated May 1, 1941, which was after the date Congress had required the Post Office Department to correct the illegal acts theretofore practiced. None of

the other papers appearing in the said Appendix of Defendant show the *appointment* of Petitioner to any office, but simply a recommendation that he be so appointed.

The question naturally arises why this case should come before this Court in view of the admitted startling facts. The Defendant attempted to justify the position taken on the ground that if the claimant had accepted the lower salary for a period of years, he was estopped from claiming the greater salary.

Petitioner alleged that when he reported for work by direction of the Civil Service Commission he was told that there was no vacancy as a garageman-driver, but that if he could pass an examination as driver-mechanic he would be put to work. The law under which this branch of the Post Office was operated provided that the men might work in a dual capacity and that they should be paid according to the class of work which they performed, regardless of their appointment. When faced with this law in the Lower Court the Government then makes the remarkable defense shown in the Note at the bottom of Pages 8 and 9 of the Brief for the Respondent in Opposition, which reads as follows:

> "While the order of the Fourth Assistant Postmaster General was expressly based upon written authority from the Civil Service Commission, the underlying statutory authority apparently included the Act of March 1, 1929, Section 1, ch. 442, 45 Stat. 1441, 39 U. S. C. 136 (see Appendix A, pp. 10-11, infra), permitting the employment of postal employees in a dual capacity "when in the judgment of the Postmaster General" such employment is required by "the needs and interests

> of the Postal Service" and provided that "the total compensation actually paid for all services does not exceed $2,000 for any one fiscal year." This statute is of no avail to petitioner for the claim period, since (1) his original petition and amended bill of particulars fail to allege that he was actually appointed to serve in a dual capacity, and that his total compensation, if recovery were allowed, would not exceed $2,000 for any one year; and (2) the Postmaster General (through the Fourth Assistant Postmaster General, who by Section 14 (5) of the Postal Laws and Regulations, 1932, was charged with the appointment of personnel in the Motor Vehicle Service) did not, prior to October 27, 1941, make either a general or specific determination that employment of petitioner in a dual capacity was in his "judgment" required by "the needs and interests of the Postal Service."

It will be noted it is contended that Petitioner is barred for two reasons; First, because he failed to allege that he was actually appointed to serve in a dual capacity and also that his total compensation would not exceed two thousand dollars per year, and Secondly, that the Postmaster General had not made a general or specific determination that his employment was, in his judgment, required by the needs and interest of the Postal Service. In answer to the first proposition, it is respectfully submitted that it was specifically alleged on Page 10 of the Amended Petition the nature of service to be performed.

> "Fifth, that at the time the Claimant was put to work, the rules and regulations of the Post Office Department (see below), which have the effect of law, provided that the Post Office Department

should keep a record of the number of hours the employees worked in a dual capacity and that their titles should correspond to the positions to which the employees devoted a greater portion of their time. (Regulation 297 of the Rules and Regulations of the Post Office Department, 1925):

> "Employees' assignments shall, wherever possible, correspond with their roster title. Where the interest of the service requires that an employee perform several duties, his title designation shall correspond to the position to which he is required to devote the greater portion of his time."

The record shows that his salary would not exceed two thousand dollars, because he alleged in the Petition that he only received 55c per hour. With regard to the second contention, namely that it had not been alleged in the Petition that the Postmaster General had determined that in his judgment Petitioner's appointment was required by the needs and interests of the Postal Service, it is respectfully submitted that by his very act in appointing this man, the Postmaster General made a determination that his services were necessary. He could not have made a stronger determination.

The decisions applicable to this case are fully covered in the Petitioners Brief attached to the Petition for Writ of Certiorari. Special reference is made, however, to the case of Glavey v. The United States, 182 U. S. 595, which reads in part as follows:

> "In the Goldsborough Case referred to, Chief Justice Taney said: 'Where an Act of Congress declares that an officer of the Government or public agent shall receive a certain compensation for

his services, which is specified in the law, undoubtedly that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress.'

Respectfully submitted,

RHODES AND RHODES,
By FRED B. RHODES
Attorneys for Petitioner.

Rhodes and Rhodes
314 National Press Building,
Washington, D. C.